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PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

PAGE

(See Appendix for complete text)

The provisions of the Constitution of the United States pertinent to this matter are:

Article 1, Section 8 3
The Tenth Amendment 3

The provisions of the Constitution of Ohio pertinent to this matter are:

Article 1, Section 1 4
Article 1, Section 19 4
Article 4, Section 2 5

The federal statutes pertinent to this matter are:

49 U.S.C. 1 3
49 U.S.C. 302 (b) 3

The Ohio Statutes pertinent to this matter are:

4903.09 5
4903.12 5
4903.13 ..... 1, 5
4905.02 3
4905.03 3

STATEMENT OF THE CASE

By application filed with the Public Utilities Commission of Ohio, hereinafter sometimes referred to as "commission", on February 13, 1970, as amended, Husman Express Co., petitioner herein, hereinafter referred to as Husman or petitioner, sought a certificate of public convenience and necessity authorizing operation in intrastate commerce, as a common carrier, by motor vehicle, over irregular routes, for the transportation of property from and to Bryan, Ohio, restricted against the transportation of household goods, office furniture and fixtures, commodities usually handled in dump trucks and unloaded by dumping, and commodities which, by reason of size or weight, require special equipment to load and unload.

A public hearing was held on March 12, 1970, at Bryan, Ohio. Bryan Truck Line, Inc., respondent herein, the holder of a certificate of public convenience and necessity authorizing the transportation of property, without qualification, from and to Bryan, Ohio, was a protestant, and, as such, adduced evidence in opposition to said application.

The attorney examiner made a recommendation to the commission that the application be denied.

On May 24, 1973, the commission issued its opinion and order in which it reversed the recommendation of its attorney examiner and granted the application, subject to the statutory sixty day order to respondent.

Respondent appealed the order of the commission to The Supreme Court of Ohio.

The Supreme Court of Ohio, following the statutory guidelines set forth in Section 4903.13, Ohio Revised Code, found the order of the commission to be unreason-

able and unlawful and, therefore, reversed said decision. The court stated in part:

> "Assuming that there is sufficient evidence in the record to support the commission's finding of a need for overnight, less-than-truckload service from and to Bryan, Ohio, the record is totally devoid of any evidence that either applicant would, if this application for certificate were granted, provide the overnight service. The order of the commission is unreasonable and unlawful and is, therefore, reversed." *Bryan Truck Line, Inc., v. Public Utilities Commission of Ohio*, 38 Ohio St. 2d 103, 106, 310 N. E. 2d 587, 589 (1974).

The only question presented by petitioner, as set forth at page two of the petition for writ of certiorari, is the following:

> "Whether, in reversing the order of the Public Utilities Commission of Ohio, the Supreme Court of the State of Ohio deprived petitioner of the opportunity to provide intrastate transportation service from and to Bryan, Ohio, without due process of law in violation of the Fourteenth Amendment to the United States Constitution by erroneously and arbitrarily finding that the record was 'totally devoid of any evidence' that petitioner would provide the needed overnight transportation service."

Respondent contends that The Supreme Court of Ohio did not act erroneously or arbitrarily, that the matter adjudicated is a state question, that this matter was adjudicated fully in accordance with state law, that the due process clause of the Fourteenth Amendment does not require the Supreme Court of the United States to reconsider the evidence in a state proceeding involving a state question, and that, in any event, the action of The Supreme Court of Ohio is supported fully by the evidence.

ARGUMENT ONE

PETITIONER HAS NOT BEEN DEPRIVED OF ANY RIGHT, PRIVILEGE OR IMMUNITY GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES

I. Whether a Certificate of Public Convenience and Necessity Should Issue Authorizing Transportation Service in Intrastate Commerce is a State Question.

Section 8 of Article 1 and the Tenth Amendment to the Constitution of the United States provide that the question of *intrastate* commerce is a state question.

More specifically, the Interstate Commerce Commission is empowered to regulate interstate commerce and the power to regulate intrastate commerce is reserved to the several states. See 49 U.S.C. Sections 1, par. (17) and 302 (b).

In addition, the Supreme Court of the United States has held that intrastate commerce is the concern of the states. See, for example, *Eichholz v. Public Service Commission,* 306 U.S. 268, 274, 59 S. Ct. 532, 535; *North Carolina v. United States,* 325 U. S. 507, 511, 67 S. Ct. 1260, 1263, 89 L. Ed. 60, and also *Palmer vs. Commonwealth of Massachusetts* 308 U. S. 79, 60 S. Ct. 34, 84 L. Ed. 93 (1934).

The legislature of the State of Ohio has seen fit to create a public utilities commission, which oversees utilities in the State of Ohio.

Title 49 of the Ohio Revised Code contains all of the powers of the Public Utilities Commission of Ohio. Sections 4905.02 and 4905.03, Ohio Revised Code, contain the Ohio statutory definition of a "public utility", which includes a "motor transportation company".

Chapter 4921 of the Ohio Revised Code provides for the regulation of "motor transportation companies".

It is also useful to note the controlling Ohio law as to what is a "certificate of public convenience and necessity". The Supreme Court of Ohio has concluded that:

> "A certificate of public convenience and necessity issued to a motor transportation company pursuant to Chapter 4921, Revised Code, is a revocable license conferring no property rights upon the holder." *Harold D. Miller, Inc., v. Public Utilities Commission,* 10 Ohio St. 2d 53 (1967).

It must be remembered here that the petitioner holds no certificate of public convenience and necessity from and to Bryan, Ohio.

Respondent asserts further that regulation over public utilities and the effect of regulation on a "person" desiring to become a public utility, as it relates to constitutional rights, is well settled in Ohio law.

When considering specifically Sections 1 and 19 of Article 1 of the Constitution of Ohio, as they relate to a "public utility" as hereinbefore described, The Supreme Court of Ohio has stated:

> "Provisions of Section 54 of the Public Utilities Act (Section 614-52 General Code) (now Section 4905.24 Revised Code), in which it is provided that no telephone company shall exercise any permit, right, license or franchise, to own or operate a plant for the furnishing of any telephone service, in any municipality or locality, where there is in operation as a telephone company furnishing adequate service, unless such telephone company first secures from the commission a certificate that the exercising of such license, permit, right or franchise is proper and necessary for the public convenience, are regulatory in nature and effect and not inconsistent with the 'right of acquiring, possessing, and protecting property', guaranteed under Section 1, Article 1, Bill of Rights; nor do they contravene Sec-

> tion 19 Article 1, Bill of Rights, in respect to the inviolability of property rights and the due compensation necessary when taken for public use."

The court went on to say in the same case:

> "Section 614-52 General Code (now Section 4905.24 Revised Code), does not deny the equal protection of the laws nor abridge the privileges or immunities of the citizens of the United States." *Celina and Mercer County Telephone Company v. The Union-Center Mutual Telephone Association* 102 Ohio St. 487.

Respondent asserts two principles that are controlling here. The first is that because the subject of this proceeding is *intrastate commerce*, it is a state question; the second is that, being a state question, the Supreme Court of Ohio has announced the law of Ohio as it pertains to petitioner's "rights, privileges or immunities".

II. The Subject of the Instant Petition for Writ of Certiorari Involves a State Question Which Has Been Adjudicated Fully in Accordance With State Law.

Section 2 of Article 4 of the Constitution of Ohio provides that The Supreme Court of Ohio shall have original jurisdiction in "(B) (2) (c) such revisory jurisdiction of the proceedings of administrative officers or *agencies* as may be conferred by law." (Emphasis supplied).

What is conferred by law is a sequence of Ohio statutes that specify the duties of the public utilities commission in issuing its orders and the duties of The Supreme Court of Ohio in reviewing those orders. See Sections 4903.09, 4903.12, and 4903.13, Ohio Revised Code.

Of special importance is Section 4903.13, Ohio Revised Code, which provides in part:

> "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, *upon consideration of*

> *the record*, such court is of the opinion that such order was unlawful or unreasonable." (Emphasis supplied.)

It is necessary to note that the Supreme Court of the United States has had occasion to make a determination in an Alabama case, wherein the Alabama procedure was very similar to the above stated Ohio procedure. The Supreme Court of the United States held:

> "The fact that review in the Alabama courts is limited to the record taken before the commission presents no constitutional infirmity . . . and, whatever the scope of review of commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the grounds that constitutional rights are involved." *Alabama Public Service Commission v. Southern Railway Company* 341 U. S. 341, 71 S. Ct. 762, 95 1002 (1951).

III. The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States does not require that the Supreme Court of the United States reconsider the Evidence in a State Proceeding Involving a State Question.

The petition here is not raising a question of interpretation of a state law, but rather it is raising a question of evidence in a state proceeding. As was just noted in *Alabama Public Service Commission v. Southern Railway Company, supra*, the Supreme Court of the United States has stated:

> "And, whatever the scope of review of commission findings when alleged denial of a constitutional right is an issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved."

Respondent submits that the above decision clearly demonstrates the theory of "federal-state comity". This

theory is applicable to this proceeding where the Constitution of Ohio and the Ohio statutes give the power to the highest court in the state to review orders of the Public Utilities Commission of Ohio. The Supreme Court of Ohio, pursuant to the Constitution of Ohio and statutory provisions, must take into consideration *the record* in order to determine if the order of the Public Utilities Commission of Ohio is unlawful or unreasonable. Thus, the petitioner here has had a full opportunity, at the state level, for a just and fair adjudication. When a party has had a fair and just adjudication at the state level, particularly a fair and just adjudication of a state question at the state level, there is no need for the federal courts to disturb the holding of the state court. It has been stated by the federal courts that:

> "The principle is well established and without dispute that under the rule of comity under our dual system of government involving state laws, rules or regulations, equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and complete determination of the controversy in a state tribunal. No cases need be cited to support this statement. It is recognized without exception. The Supreme Court has held that where there is pending in Federal Court a case involving the construction of a state law and if one construction would remove the federal question a federal court should stay its hand, retain jurisdiction and relegate the parties to the state court to first seek a construction of the statute. *Other cases hold that where parties have come into federal court for determination of rights, the federal court should not only stay its hand but should dismiss the action, where there is available in the state courts a complete and adequate remedy for the determination of the same questions presented in the federal action.*"

General Investment and Service Corporation, Inc., et al., v. Wichita Water Company, 236 Federal 2d 464, 468 (1956). (Emphasis supplied.)

Although *General Investment and Service Corporation, Inc., et al., supra,* appears to involve a federal proceeding where a state proceeding was pending at *the same time,* respondent asserts that the same principle of comity applies here where the state proceeding has been *completed.* There is no need here for the federal court to review a question of *evidence* in a state proceeding involving a state question.

Respondent submits that the Supreme Court of the United States, in the cases cited herein, has recognized, generally, that a public utilities commission of a state has acknowledged expertise in the area of intrastate commerce. Respondent further submits that it is just as clear that the Supreme Court of the United States has recognized that, in order to afford parties due process of law, a judicial appeal from a state public utilities commission ruling is necessary. This judicial appeal has been taken by the respondent in the proceeding in question. It is evident that the Supreme Court of Ohio acted to protect the respondent's due process of law as well as petitioner's due process of law.

IV. In Any Event, The Supreme Court of Ohio Did Not Act Erroneously or Arbitrarily and Its Holding is Supported by the Evidence.

Respondent agrees with petitioner that the law of Ohio is:

> "An applicant for an irregular route certificate of public convenience and necessity to transport property from and to a specific location assumes the burden of proving not only that there is a need for such service, but also that the granting of the application will correct any deficiency in the service pro-

vided the public by an existing certificate holder." *Mohawk Motor, Inc., vs. Public Utilities Commission* (1967), 11 Ohio St. 2d 238, 228 N. E. 2d 611.

The claim of petitioner of lack of due process relating to the finding by The Supreme Court of Ohio that the record was "totally devoid" of any evidence that petitioner would provide the needed overnight transportation service is without merit.

Petitioner has extracted certain parts of the testimony out of context to support its position.

The requirement of *Mohawk, supra,* that is involved here is whether the applicant showed "that the granting of the application will correct any deficiency in the service provided the public by an existing certificate holder". In other words, the question was whether or not petitioner, as a matter of record, was in a position, at the time of the hearing, to provide overnight less-than-truckload service between Bryan, Ohio, on the one hand and, on the other hand, *all points in Ohio.*

Indeed, the record is totally devoid of any such evidence.

The evidence of record is that petitioner sometimes provides overnight less-than-truckload service to its terminal areas; that it sometimes does not provide overnight less-than-truckload service to its terminal areas and that there are many parts of the state to which it provides no less-than-truckload service at all. (See Appendix B for official record, pages 146, 147, 148 and 149).

It is clear that the petitioner did not meet the requirements of *Mohawk, supra,* for the issuance of a certificate. Therefore, the Supreme Court of Ohio did not act erroneously or arbitrarily in reversing the order of the Public Utilities Commission of Ohio.

ARGUMENT TWO

THERE IS NO JUSTIFICATION TO REVERSE THE SUPREME COURT OF OHIO OR REMAND THIS PROCEEDING TO EITHER THE SUPREME COURT OF OHIO OR THE PUBLIC UTILITIES COMMISSION OF OHIO

Although respondent contends that argument one hereinbefore presented adequately demonstrates why this petition should be denied, brief mention will be made contra to arguments two and three of petitioner.

Respondent asserts that in its argument two, petitioner has cited a decision of The Supreme Court of Ohio out of context.

Petitioner refers to *Motor Service Company, Inc., v. Public Utilities Commission,* 39 Ohio St. 2d 5 (1974), as stating the following:

> "Nowhere in the commission's opinion and order are there findings of fact or reasons supporting the issuance of the aforementioned orders, nor does any citation to the record indicate support for or reasons behind such orders.
>
> "It is the opinion of this court that the commission failed to make specific findings of fact, supported by the record, or to state reasons derived therefrom, which prompted its decision, in violation of the requirements of R. C. 4903.09.
>
> "For the foregoing reasons, the decision of the Public Utilities Commission is affirmed in part and reversed in part and the cause is remanded to the commission for further proceedings in accordance with this opinion."

In making such a statement, the court relies heavily on *Commercial Motor Freight, Inc., v. Public Utilities Commission,* 156 Ohio St. 360 (1951). The court in *Motor Service Company, Inc., supra,* used the following hold-

ing from *Commercial Motor Freight, Inc., supra,* at Page 14:

> "Probably the principal purpose of Section 614-46a, General Code, was to enable this court to review the action of the commission without reading the voluminous records in the Public Utilities Commission cases. Where the commission states the facts found upon which it bases its decision, this court can usually readily determine, as it is required to do by Section 544, General Code, whether the order of the commission is 'unlawful or unreasonable'. *A review of the essential facts so found can also be made with the help of record references supplied by opposing counsel in their briefs.* The General Assembly never intended this court to perform the same functions and duties as the Public Utilities Commission but it did intend that *this court should determine whether the facts found by the commission lawfully and reasonably justified the conclusions reached by the commission in its order and whether the evidence presented to the commission as found in the record supported the essential findings of fact so made by the commission."* (Emphasis supplied.)

It is obvious that The Supreme Court of Ohio felt that the record was "totally devoid" in the proceeding which is the subject of this petition for writ of certiorari. Just as obvious is that the court found the record "totally devoid" *upon consideration of the record* taken and with the help of the record references supplied by opposing counsel in their briefs. Again, it is clear The Supreme Court of Ohio acted to protect the due process of the respondent as well as the petitioner.

CONCLUSION

The point that respondent makes in response to the arguments of petitioner leaves the query "why does

petitioner desire the Supreme Court of the United States to tread upon the same ground over which The Supreme Court of Ohio has already tread?" Citing parts of transcripts most favorable to one's position is a natural tendency of an advocate. Respondent does not wish to merely submit the cross-examination of the same witnesses or other parts of the transcript that are contra to make its point. The Supreme Court of Ohio, using proper precedents from Ohio law and upon *consideration of the record taken,* has made an accurate and proper ruling.

The respondent here asserts that petitioner has asserted no substantial federal question for review by this court. Respondent further asserts that the Constitution of the United States, prior decisions of this court and other federal courts and the law of the State of Ohio, all clearly demonstrate that a citizen of Ohio, petitioner, has not been deprived of the opportunity to provide intrastate transportation service from and to Bryan, Ohio, without due process of law. The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was sent by regular United States mail to Paul F. Beery of the firm of Paul F. Beery Co., L.P.A., 8 East Broad Street, Columbus, Ohio, on this 25 day of October, 1974.

JAMES DUVALL
Attorney for Respondent

APPENDIX

Respondent recognizes petitioner's appendices A through D as containing appropriate decisions of the Supreme Court of Ohio and the Public Utilities Commission of Ohio in this matter.

APPENDIX A

The respondent provides the following text from the cited materials:

The provisions of the Constitution of the United States pertinent to this matter are:

> Article 1, Section 8
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
> Tenth Amendment
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The provisions of the Constitution of Ohio pertinent to this matter are:

> Article 1, Section 1
> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.
> Article 1, Section 19
> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other

cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Article 4, Section 2

(A) . . .

(B) (2) The supreme court shall have appellate jurisdiction as follows:

(c) Such revisory jurisdiction of the proceedings of administrative officers of agencies as may be conferred by law;

The federal statutes pertinent to this matter are:

49 U.S.C. 1, par. (17)

That nothing in this chapter shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter and except as otherwise provided in this chapter.

49 U.S.C. 302(b)

Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

The Ohio Statutes pertinent to this matter are:

4903.09 Ohio Revised Code

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact

and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

4903.12, Ohio Revised Code

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

4903.13, Ohio Revised Code

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

4905.02, Ohio Revised Code

As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code, "public utility" includes every corporation, company, copartnership, person, or association, their lessees, trustees, or receivers, defined in section 4905.03 of the Revised Code, including all telephone companies, but excepting such other public utilities as operate their utilities not for profit, such other public utilities as are owned or operated

by any municipal corporation, and railroads as defined in sections 4907.02 and 4907.03 of the Revised Code.

4905.03, Ohio Revised Code

As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code:

(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

(3) A motor transportation company, when engaged in the business of carrying and transporting persons or property or the business of providing or furnishing such transportation service, for hire, in or by motor-propelled vehicles of any kind, including trailers, for the public in general, over any public street, road, or highway in this state, except as provided in section 4921.02 of the Revised Code;

APPENDIX B

(examination of witness for Husman Express Co.)

"**Q.** Do I understand then that under your present proposal that all traffic from Bryan will originate in somewhat the same way it does now, by your local cartage company, thence via over the road trailer to the main terminal in Cincinnati?

"**A.** That's right.

"**Q.** Thence it will be broken down and reloaded out to other points in Ohio; is that basically what you have in mind?

"**A.** Basically, correct.

"**Q.** Would you look at the Exhibit the gentleman from Ohio Art Company submitted; I believe it is identified as Exhibit 3 and in column two of that Exhibit he listed a number of points which he characterized as being points where there was no dependable direct LTL service. Some comment was made about the points of Bowling Green and others. Would you look down that list in column two and I will give you time to look at it; you have one of three sheets. Let me ask you in connection with your present runs, would you be able to give dependable single line service in the way you describe to all the towns listed in that column two?

"**A.** No, I can't give service, dependable service to the river towns down East.

"**Q.** Okay.

"**A.** I could serve them but not economically.

"**Q.** The way your present runs are now on your Exhibit B, they leave several portions of the State of Ohio unattended, do they not?

"**A.** That's correct.

"**Q.** Now, looking at the Exhibit sponsored by the Aro Corporation and also Exhibit Number 5, did you get a copy of that?

"**A.** I have seen it.

"**Q.** It has some points with stars in front of them; Paul will hand you a copy of that.
"**A.** Okay.
"**Q.** And I believe the gentleman indicated that the reason for the star was that he believed that there was no direct service from Bryan. Now looking at those points with the stars in front of them, what kind of service would you offer to those particular towns?
"**A.** I sure could help out on Youngstown.
"**Q.** Just with Youngstown; you would take a shipment from Bryan south 180 miles back to Cincinnati, thence about 250 miles or 300 miles?
"**A.** 300 miles.
"**Q.** Northeast to Youngstown?
"**A.** Right.
"**Q.** So you are going to travel over 500 miles to get from Bryan to Youngstown, right, the way you are going to run it?
"**A.** No; I don't think you understand. We haul freight; we load these on the revenue they produce and when we can produce enough revenue to move the freight we move it. It costs $1.16 a mile to move these. When we have enough to proceed with the run we move it and our volume is such as can move as often as we want to.
"**Q.** My question is do you feel —
"**A.** This particular piece of freight I would personally drive it over in my car.
"**Q.** This shipment actually would go close to 500 miles actual load, wouldn't it?
"**A.** It stays overnight in Chicago. It doesn't matter how many miles it is going.
"**Q.** And the fact that it would be handled that way would depend on whether or not you are able to load directly for Youngstown a sufficient number of times per week to handle it in that way?
"**A.** That's right.
"**Q.** This would be true of any of the runs you exhibit on Exhibit D?

"**A.** That's right. Those aren't necessarily serviced every day on all the towns you had. We don't hit the same town each day, you understand that?

"**Q.** I understand. I was asking in say run number six where you pick up some the western part of the state. You showed that one on your Exhibit, didn't you?

"**A.** Yes.

"**Q.** You wouldn't run that every day, that combination, would you?

"**A.** No, not that combination of towns but similar areas would be serving different towns in the same area.

"**Q.** Well, what you would do is collect enough freight there in Cincinnati to make up one of these peddle runs?

"**A.** That's right, that's right.

"**Q.** Do you know how long it took you to collect freight to make up run number six?

"**A.** I don't, no. Freight isn't held over a day or two at our break bulk terminal."